

THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rocktron Corporation

Serial No. 74/531,669

Robert A. Dunn of Dinnin & Dunn, P.C. for Rocktron
Corporation.

Loretta C. Beck, Trademark Examining Attorney, Law Office
102 (Thomas V. Shaw, Managing Attorney).

Before Seeherman, Walters and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration of the mark depicted
below

for goods identified as "electronic audio signal processing
components, namely encoders and controllers for surround

sound or home theater sound recording, and decoders for surround sound or home theater playback."¹

Registration has been refused under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that applicant's mark, as applied to applicant's goods, so resembles the mark CS (in typed form), for goods identified as "amplifiers,"² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, applicant appealed. Applicant and the Trademark Examining Attorney filed briefs, but applicant did not request an oral hearing. We affirm the refusal.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods*,

¹ Application Serial No. 74/531,699, filed May 31, 1994. The application is based on applicant's allegation of use in commerce since December 1, 1993.

² Registration No. 1,486,017, issued April 26, 1988. Affidavits under Trademark Act Sections 8 and 15 accepted. The record owner of the registration is Peavey Electronics Corporation.

Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, we find that applicant's mark and the registered mark share the same dominant feature, i.e., the letters "CS". These letters appear to be arbitrary as applied to the goods identified in the application and in the registration, without any special meaning in the industry.³ They comprise the whole of the registered mark, and they are the literal portion of applicant's mark which would be used by purchasers to refer to or call for applicant's goods. *See In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Indeed, it appears from applicant's specimens of use that applicant itself often uses merely the letters "CS" to refer to its goods, i.e., "CS is a 4-2-4 matrix system, which is how broadcast and storage can be realized within two-channel mediums"; and "[i]n terms of audio, CS is of the highest possible standard." (Emphasis in original.)

Thus, we find that the marks at issue are identical in terms of their sound. Comparing the marks next in terms of appearance and commercial impression, we note that

³ Applicant argues that the letters "CS" stand for or are an abbreviation of the term "Circle Surround," which is the name of applicant's surround-sound system, and that they would be used by applicant in conjunction with applicant's CIRCLE SURROUND mark. However, the words CIRCLE SURROUND are not part of the mark sought to be registered here, so they cannot be considered in our determination of the significance or connotation of applicant's mark.

applicant's mark includes a design element which is not present in the registered mark, i.e., a circular arrow device within which the letters "CS" are enclosed.

Applicant argues that this design element plays a large role in the commercial impression of applicant's mark, in that it connotes or suggests that applicant's goods employ surround-sound technology. However, it is because of this suggestive significance of the design element that the letters "CS" form the dominant part of applicant's mark.

Moreover, because the registered mark is depicted in typed form, registrant would be entitled to display the mark in various forms, including enclosure of the letters "CS" in a circular carrier device. *See In re Fisher Tool Co., Inc.*, 224 USPQ 796 (TTAB 1984). Although applicant's mark would not be identical in appearance to registrant's mark as so displayed, the marks nonetheless would be similar in terms of appearance and commercial impression, in that they both would consist of the arbitrary letters "CS" enclosed within, or surrounded by, a circular carrier device.

In short, when we consider the marks in their entireties in terms of their appearance, sound, meaning and overall commercial impression, we find that they are similar, rather than dissimilar. This similarity of the

marks weighs in favor of a finding of likelihood of confusion.

We turn next to a determination of whether applicant's goods, as identified in the application, are sufficiently closely related to the goods identified in the cited registration that source confusion would be likely to result from the use of similar marks on such goods. We find that the requisite commercial relationship between applicant's goods and registrant's goods exists in this case.

Initially, we must address applicant's argument that although registrant's goods are identified broadly in the registration as "amplifiers," in actual fact registrant uses the registered mark only on "guitar amplifiers," goods which applicant asserts are highly dissimilar from the sophisticated audio equipment on which applicant is using its mark. Applicant has submitted the declaration of its officer Robert Waller as evidence in support of this contention. Citing *In re Trackmobile, Inc.*, 15 USPQ2d 1152 (TTAB 1990), applicant argues that the Board's determination of whether applicant's goods are related to registrant's goods should take into account this extrinsic evidence as to the limited scope of the registrant's actual goods.

In re Trackmobile, Inc., supra, is inapposite to the present case. Unlike the situation presented in *Trackmobile*, where the Board was uncertain as to the very nature of the "light railway motor tractors" identified in the registration at issue, in the present case the Board does not need the benefit of extrinsic evidence in order to ascertain what "amplifiers" are. The Board therefore will accord to the word "amplifiers" its normal, ordinary commercial meaning, and presume that registrant is entitled to use its mark on any and all "amplifiers," not just "guitar amplifiers."⁴

The evidence of record shows that the term "amplifiers" is used to refer to certain components which would be used in conjunction with or as part of surround-sound audio systems. Indeed, applicant has admitted that its decoder must be used with an amplifier in order to function properly. Thus, we find that surround-sound components such as applicant's and amplifiers such as those

⁴ As acknowledged by applicant in its April 28, 1995 response to the first office action refusing registration, if applicant believed the identification of goods in the cited registration to be overly broad, applicant's remedy would have been to file an action for partial cancellation of that registration. See, e.g., *Eurostar, Inc. v "Euro-Star" Reitmoden GmbH & Co KG*, 34 USPQ2d 1266 (TTAB 1994).

identified in the registration are complementary and thus related products.

Moreover, even if we were to limit registrant's goods to "guitar amplifiers," as suggested by applicant, we would still find the goods to be related. The evidence of record in this case clearly shows that applicant markets its goods to musicians involved in the live performance of music and in the producing and recording of music. These are the same purchasers to whom "guitar amplifiers" would be sold.⁵

For example, applicant's specimens state that applicant's surround-sound system "is the first surround sound system designed specifically for *music production*" (emphasis in original); that applicant's system "opens the wildly expanding surround market to the musician/producer, at an extremely affordable price"; that applicant's surround-sound encoder includes features "allowing it to optimally interface with all pro and semi-pro recording

⁵ Additionally, we note that applicant's vice-president, Mr. Waller, states that "[a] segment of Rocktron's product line is directed toward signal processing for live music performances, particularly for electric guitar players in the rock and roll music genre." (Declaration of Robert Waller (March 6, 1996) at page 1.) It is unclear whether applicant markets these products to guitarists under the mark at issue in this case. However, the fact that applicant's product line includes both the surround-sound components identified in the application and audio equipment made specifically for electric guitarists further supports a finding that purchasers would be likely to perceive a source connection between such goods.

gear" (emphasis added);⁶ and that applicant's system "has established itself within virtually every audio arena: major recording studios, live performance venues, theme parks, and automotive and home audio." (Emphasis added.) Similarly, applicant's brochure entitled CIRCLE SURROUND, submitted with the March 6, 1996 Declaration of Robert Waller, states that applicant's system "can let the studio owner, broadcaster, film maker, convention or trade show presenter, video game creator and concert artist affordably enter this rapidly expanding world of true sonic and spatial realism" (emphasis added); and that "[p]roducing in CS is quite simple. Any mixer with a stereo program bus and a couple of aux sends can be used."⁷

In short, the record shows that applicant's goods are commercially related to the "amplifiers" identified in the cited registration, even if we were to construe

⁶ The Wonderland Music Superstores advertisement submitted by applicant with its response to the first office action displays a guitar amplifier made by registrant immediately adjacent to the "424 Portastudio," a portable recording studio which would appear to be the sort of "semi-pro recording gear" with which applicant's surround-sound components may "optimally interface." The significance of the numerals "424" as used in "424 Portastudio" is not clear from the record, but the Board notes that applicant, in its specimens of use, describes its system as "a 4-2-4 matrix system." See *supra* at page 4.

⁷ It is unclear whether the "424 Portastudio" advertised in the Wonderland Music Superstores advertisement might be the sort of "mixer" with which applicant's components can be used. See discussion *supra* at footnote 6.

registrant's "amplifiers" so narrowly as to encompass only "guitar amplifiers." This relationship between the respective goods, especially when considered in light of the confusing similarity of the marks, warrants a finding that confusion is likely in this case.

We have carefully considered all of applicant's arguments with respect to the other *du Pont* likelihood of confusion factors, but we are not persuaded that the evidence of record as to any of those other factors significantly favors applicant, or that it is sufficient to counterbalance, in our likelihood of confusion analysis, the similarity of the marks and commercial relationship between the goods.

Briefly stated, we are not persuaded on this record that the normal trade channels for applicant's goods do not overlap with the normal trade channels for the goods identified in the registration, given the complementary nature of the goods. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Nor are we persuaded on this record that purchasers of the types of goods identified in the application and in the registration are necessarily sophisticated purchasers or, more importantly, that they necessarily would be immune to source confusion when faced with the similar marks and related goods involved in this case. See *Refreshment*

Machinery Incorporated v. Reed Industries, Inc., 196 USPQ 840 (TTAB 1977).

Furthermore, the third-party registrations of marks consisting or comprised of the letters "C" and "S" are entitled to little weight in our likelihood of confusion analysis. (Because the Trademark Examining Attorney has not objected to applicant's third-party registration evidence on the ground that it was submitted in the form of a commercial search report, we have considered the evidence.) The third-party registrations submitted by applicant do not establish that the marks depicted therein are in use in commerce or that they are familiar to consumers, and, moreover, none of the registrations appears to be for goods which are similar to the goods involved in this case.

The fact that applicant is unaware of any instances of actual confusion does not persuade us that there is no likelihood of confusion in this case. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990), and cases cited therein. Moreover, the alleged absence of actual confusion is entitled to little weight in our likelihood of confusion analysis because we cannot determine on this record that there has been any meaningful opportunity for actual

confusion to have occurred in the marketplace. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992).

Finally, it is not dispositive that registrant's mark may not be famous, nor are we persuaded on this record that the strength of applicant's mark is such as to weigh significantly against a finding of likelihood of confusion in this case.

In short, after carefully considering all of the evidence of record pertaining to the relevant *du Pont* factors, we conclude that confusion is likely in this case.

Decision: The refusal to register is affirmed.

E. J. Seeherman

C. E. Walters

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board